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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Part 1292

Docket No. EOIR 138F; A.G. Order No. 3377-2013

RIN 1125-AA39

Registry for Attorneys and Representatives

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule; request for comments.

SUMMARY: This final rule adopts, as amended, the proposed rule to authorize the Director of the Executive Office for Immigration Review (EOIR), or his designee, to register attorneys and accredited representatives as a condition of practicing before immigration judges and the Board of Immigration Appeals (Board or BIA). The final rule provides that the Director may establish registration procedures, including a requirement for electronic registration, and may administratively suspend from practice before EOIR any attorney or accredited representative who fails to provide certain registration information. This rule is part of an initiative to create an electronic case access and filing system within EOIR. The Department of Justice (Department) will publish a notice in the Federal Register prior to implementing the registration process. Although this rule is published as a final rule, post-promulgation public comments will be considered as EOIR moves forward with other phases of its electronic access and filing initiative.

DATES: Effective date: This rule is effective [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. Comment date: Written comments must be submitted on or before [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by EOIR Docket No. 138F, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.
- Mail: Jeff Rosenblum, General Counsel, Office of the General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 138F on your correspondence. You may also use this mailing address to submit disks or CD-ROMs.
- Hand Delivery/Courier: Jeff Rosenblum, General Counsel, Office of the General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041. Contact Telephone Number (703) 305-0470.

FOR FURTHER INFORMATION CONTACT: Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041, telephone (703) 305-0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

On December 30, 2003, the Department published in the Federal Register a proposed rule that would establish a registry of attorneys and representatives who practice before EOIR. 68 FR 75160. The comment period ended March 1, 2004. The Department received seven letters from organizations and individuals, including the

American Immigration Lawyers Association, several law school clinical programs, and two attorneys. Because some comments overlap and all of the commenters raised multiple subjects, the comments are addressed below by topic rather than by reference to a specific commenter. The changes to the proposed regulatory text made in response to public comments are addressed below. With the exception of the additional changes explained below, all other provisions of the proposed rule on which the public did not comment are adopted without change in this final rule.

As described further below, EOIR regards this rule as an initial step in a multi-year, multi-phased initiative to make the transition to an electronic case access and filing system. Therefore, EOIR will accept post-promulgation comments regarding this rule and will consider them as it moves forward with its initiative.

II. Regulatory Background

This rule amends 8 CFR part 1292 by revising § 1292.1(a)(1) and (a)(4), and by establishing a new paragraph at § 1292.1(f).¹ These amendments provide the Director of EOIR with the authority to require attorneys and accredited representatives to register with EOIR in order to practice before its immigration judges and the Board.² The rule specifies the information that attorneys and accredited representatives will need to provide to EOIR when registering. The Director will require that attorneys and accredited representatives register through electronic means.³

¹ As noted below, EOIR will publish a notice in the Federal Register specifying the date on which attorneys and accredited representatives will first be able to register and the date by which attorneys and accredited representatives must register. The final rule revises slightly the proposed rule's amendments to 8 CFR 1292.1(a)(1) and (a)(4) to clarify that EOIR will not require attorneys and accredited representatives to register by the effective date of this rule. Instead, EOIR will publish further implementation guidance in the Federal Register.

² For purposes of this rule, the term "attorney" refers to any individual meeting the definition of "attorney" in 8 CFR 1001.1(f), except any attorney who represents the Federal Government before EOIR. The term "accredited representative" refers only to an accredited representative who is accredited to appear before EOIR. *See* 8 CFR 1292.2(d). The provisions of this rule do not apply to accredited representatives who are only accredited to appear before the Department of Homeland Security. *See id.*

³ As part of the registration process, attorneys and accredited representatives will be required to attest to the accuracy of the data they are submitting electronically.

EOIR is permitted to authorize individuals to practice in proceedings before immigration judges and the Board. *See* 8 U.S.C. 1229a(b)(4)(A) and 8 CFR part 1292. Pursuant to this final rule, attorneys and accredited representatives will need to register in order to be authorized to practice before EOIR. If an attorney or accredited representative who has cases pending with EOIR when this final rule takes effect fails to register by the deadline for registering, EOIR may administratively suspend that individual from practice.⁴ An attorney or accredited representative subject to administrative suspension will be able to resume practicing before EOIR upon his or her completion of the registration process. While administrative suspension, on its own, is not disciplinary in nature, multiple attempts by an unregistered attorney or accredited representative to appear before EOIR may result in disciplinary sanctions. Any individual meeting the definition of “attorney” in 8 CFR 1001.1(f) (other than one who represents the Federal Government) or the definition of “representative” in 8 CFR 1001.1(j) is subject to disciplinary sanctions for misconduct, even if the individual is not registered. *See* 8 CFR 1003.101(b).

The requirement that attorneys and accredited representatives register with EOIR is part of an initiative to create an electronic case access and filing system within EOIR. The Government Paperwork Elimination Act (GPEA), Public Law 105-277, tit. XVII, section 1704, 112 Stat. 2681, 2681-750 (Oct. 21, 1998), 44 U.S.C. 3504 note, provides that, when practicable, Federal agencies will provide for the electronic submission of information. As an initial step in the process of creating an electronic filing system, EOIR must register attorneys and accredited representatives.

When an attorney or accredited representative registers, he or she will create a unique UserID and password for online access to the registry, and EOIR will assign a

⁴ If an attorney or accredited representative cannot appear at a hearing because he or she has failed to register, the immigration judge has the means available to avoid prejudice to the alien’s case, which might include granting one-time permission for the attorney or accredited representative to appear in the case prior to registering, as discussed below, or a continuance under the applicable case law.

unique EOIR identification number (EOIR ID number) to each registrant.⁵ The EOIR ID number will ensure that each attorney and accredited representative will be specifically identified in the electronic case filing system with his or her registration information. Currently, the Board and each immigration court assign a three-character identifier to attorneys and accredited representatives appearing before them for use in EOIR's case tracking system. As a result, EOIR could have multiple identifiers for the same attorney or accredited representative in different courts, and different attorneys and accredited representatives may have the same identifiers in different courts. This decentralized structure is inadequate for the electronic case filing system that EOIR intends to establish.

Through the registration process, EOIR will ensure that each attorney or accredited representative will be individually identified and associated with the registration information that the attorney or accredited representative will provide during registration. This will reduce errors concerning an attorney's or accredited representative's correct mailing address and avoid confusion as to who is representing a particular alien.⁶ Further, registered attorneys and accredited representatives will be able to access the registry with their unique UserIDs and passwords to update their registration information online and, in the future, to access EOIR's electronic filing system.⁷

III. Registration

Following the promulgation of this final rule, EOIR intends to require all attorneys and accredited representatives who practice before immigration judges or the Board to register online. EOIR will require that attorneys and accredited representatives provide the following information when registering: full name; date of birth; business

⁵ The notice of proposed rulemaking indicated that EOIR would issue UserIDs to registrants. *See* 68 FR 75161. However, since the time of publication, application design and security standards have evolved, and it is now preferred that individual applicants select their own UserID and password to create online accounts.

⁶ EOIR intends to issue in a Federal Register notice guidance, as needed, to be followed when an attorney or accredited representative seeks to change his or her address.

⁷ EOIR will not require an attorney or accredited representative to include his or her online UserID on Form EOIR-27 and Form EOIR-28, as originally stated in the notice of proposed rulemaking, but instead EOIR will require each registrant to include his or her assigned, unique EOIR ID number on these forms.

address(es); business telephone number(s); email address; bar admission information (for attorneys);⁸ and recognized organization (for accredited representatives).⁹

As noted above, EOIR will require an attorney or accredited representative to create a unique UserID and password for online access to the registry. Prior to approving a registry account and issuing an EOIR ID, EOIR will also require a registry applicant to present photo identification in person, so that the applicant's identity can be validated. EOIR does not anticipate that the in-person presentation requirement will be unduly burdensome. Applicants for registration will be able to present their identification at any immigration court or at the Board's Office of the Clerk. In addition, EOIR anticipates that applicants may be able to present their identification at other locations where EOIR hearings are conducted, including those where hearings are conducted by video conference. Before the registration requirement takes effect, EOIR will issue additional information on its website regarding the locations at which registry applicants will be able to present their identification.

EOIR will include this online registration requirement consistent with mandatory guidance published by the Office of Management and Budget (OMB), which "requires agencies to review new and existing electronic transactions to ensure that authentication processes provide the appropriate level of assurance."¹⁰ Once registered, attorneys and accredited representatives will receive online access to sensitive information—specifically, personally identifiable information.¹¹ Initially, registered attorneys and

⁸ Specifically, all attorneys will be required to list their state bar membership(s) as part of the online registration. An attorney who is a member of a state bar association that issues bar numbers will also be required to list his or her bar number(s) while registering.

⁹ In the notice of proposed rulemaking, EOIR indicated that it may request that accredited representatives indicate the recognized organization with which they are affiliated. In this final rule, EOIR has decided to require that an accredited representative indicate the recognized organization(s) with which they are affiliated. This is consistent with the regulatory requirement that all accredited representatives must be affiliated with an organization that has received recognition by the Board pursuant to 8 CFR 1292.2(a).

¹⁰ See OMB Memorandum to the Heads of all Departments and Agencies, *E-Authentication Guidance for Federal Agencies*, Dec. 16, 2003, section 1.1, at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy04/m04-04.pdf>.

¹¹ Personally identifiable information is "information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc. alone, or when

accredited representatives may have online access to clients' names and addresses. In the future, once EOIR's electronic filing system is introduced, registered attorneys and accredited representatives will have online access to clients' court files, which often include additional sensitive information such as asylum applications, records of criminal convictions, and financial and medical records.

Applying the standards set forth in the OMB guidelines, EOIR has determined that the potential impact of the unauthorized release of the sensitive information described above is moderate, as the unauthorized release of information such as an individual's address, asylum application, records of criminal convictions, financial records, or medical records "could be expected to have a serious adverse effect" on the person involved.¹² The OMB guidelines require that, where the potential impact of the unauthorized release of sensitive information is moderate, there must exist a "[h]igh confidence in the asserted identity's validity" in order for an individual to access government services online.¹³ EOIR's requirement that applicants present photo identification in person will provide EOIR with a high degree of confidence in a registering attorney's or accredited representative's identity, and therefore meets the standards of the OMB guidelines.

This validation requirement replaces the requirement in the proposed rule that each registry applicant enter the last four digits of his or her Social Security number. *See*

combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc." OMB Memorandum for the Heads of Executive Departments and Agencies, *Safeguarding Against and Responding to the Breach of Personally Identifiable Information*, May 22, 2007, at 1 n. 1, at

<http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-16.pdf>.

¹² OMB guidance states that the potential impact of an unauthorized release of sensitive information is moderate if, "at worst, a release of personal . . . information to unauthorized parties result[s] in a loss of confidentiality with a moderate impact as defined in [the Federal Information Processing Standards Publication 199 [FIPS PUB 199], *Standards for Security Categorization of Federal Information and Information Systems*]." OMB Memorandum, *supra* note 10, section 2.2. In turn, FIPS PUB 199 states that the potential impact of a breach of security is moderate if "[t]he loss of confidentiality . . . could be expected to have a serious adverse effect on . . . individuals." FIPS PUB 199, Feb. 2004, p. 2, at <http://csrc.nist.gov/publications/fips/fips199/FIPS-PUB-199-final.pdf>.

¹³ OMB Memorandum, *supra* note 10, section 2.1, 2.2.

68 FR 75162. EOIR notes that online security standards have evolved since the proposed rule was published in 2003, and EOIR believes that the proposed rule's procedures for registration and validation of identity, while sufficient then, would not comply with current security standards. Further, OMB has broadly directed agencies to reduce their collection of social security numbers.¹⁴

EOIR is implementing this requirement that a registry applicant validate his or her identity by presenting photo identification as a final rule, because this validation method is a logical outgrowth of the requirement in the proposed rule that an applicant submit the last four digits of his or her social security number. *See, e.g., Environmental Defense Center v. U.S. E.P.A.*, 344 F.3d 832, 852 (9th Cir. 2003); *American Water Works Ass'n v. E.P.A.*, 40 F.3d 1266, 1274 (D.C. Cir. 1994). Both requirements represent means of validating an applicant's identity before registration is permitted; the final rule simply changes how the applicant's identity is validated. An interested party should have anticipated that the final rule would continue to contain a validation requirement involving personally identifiable information. *See Environmental Defense Center*, 344 F.3d at 851 (stating that "[i]n determining whether notice was adequate [where a final rule differs from a proposed rule], we consider whether the complaining party should have anticipated that a particular requirement might be imposed"). Although, under the final rule, an attorney or accredited representative must validate his or her identity in person, EOIR does not believe that the requirement will impose a significant burden on applicants. As noted above, applicants will be able to present their identification at any immigration court and at the Board's Office of the Clerk, and EOIR anticipates that applicants may also be able to present their identification at other locations where EOIR hearings are conducted, including those where hearings are conducted by video.

¹⁴ *See* OMB Memorandum, *supra* note 11, at 7 (stating that "[a]gencies must now . . . review their use of social security numbers in agency systems and programs to identify instances in which collection or use of the social security number is superfluous," and that "[a]gencies must participate in government-wide efforts to explore alternatives to agency use of Social Security Numbers as a personal identifier for both Federal employees and in Federal programs").

The notice of proposed rulemaking also indicated that EOIR would request, but not require, an email address during the registration process. However, in the years since the proposed rule was published, Internet connectivity has become extremely common and, for the legal profession, a necessity. In recognition of the widespread use of Internet connected computers and other devices, this final rule requires that attorneys and accredited representatives who register provide an email address. Further, EOIR must obtain an email address for each attorney and accredited representative in order to send case-related notices to them electronically. The ability to do this is essential to implement the electronic filing system that EOIR intends to establish in the future. Given the wide availability and use of the Internet in the legal profession, the provision in the final rule requiring an email address during the registration process does not impose a significant burden on applicants and does not constitute a significant change to the proposed rule.

Prior to implementing the registration process, the Department will publish a notice in the Federal Register that provides the date on which registration will commence, the date by which all attorneys or accredited representatives must register, and instructions for registering.

IV. Responses to Comments

Comment. One commenter questioned the utility of an attorney registry. The commenter stated that registration would constitute an unnecessary burden on attorneys because the requested information would be duplicative of that requested in Form EOIR-27 and Form EOIR-28 (Notice of Appearance). The commenter also suggested that EOIR require registration only for those persons who wish to participate in an electronic filing system.

Response. As explained above, the requirement that attorneys and accredited representatives register with EOIR is part of an initiative to create an electronic case access and filing system pursuant to the GPEA. EOIR must register attorneys and

accredited representatives as an initial step in the process of creating an electronic filing system.

Registration will primarily consist of providing, through an EOIR webpage, the information described in the regulation and presenting photo identification in person, so that the registry applicant's identity can be validated. This process is free and relatively simple. The information collected will be different, in part, from that requested in Form EOIR-27 and Form EOIR-28 and will consist of the applicant's name, business address(es), business telephone number(s), date of birth, email address, bar admission information (if applicable), and recognized organization (if applicable). As discussed below, the collected information will be used to approve a unique UserID and password created by each registrant that will permit access to the registry and, in the future, access to EOIR's electronic filing system. Also, EOIR will assign each registrant a unique EOIR ID number and require that the registrant include this EOIR ID number on any Form EOIR-27 or Form EOIR-28 he or she files with EOIR. In accordance with the Paperwork Reduction Act, the Department is republishing in this rule the new information collection, previously published in the 2003 proposed rule, in order to obtain additional comments from the public and affected agencies.

The Department notes that the registration of attorneys and accredited representatives will benefit both EOIR and the registrants. The registry will ensure that each attorney or accredited representative is individually and uniquely identified and associated with the registration information that the attorney or accredited representative will provide during registration. This will increase efficiency by reducing system errors in scheduling matters and providing improved notice to attorneys and accredited representatives. Further, registration will ultimately enable an electronic filing system that will reduce the time and expense presently incurred with paper filings.

Such an electronic filing system will also lead to automation of EOIR's case management system and bring greater efficiency to EOIR's handling of cases. In order to

yield significant benefit from electronic filing, EOIR must include all attorneys and accredited representatives who appear before it. Therefore, attorneys and accredited representatives will be required to participate.

Comment. One commenter expressed concern that the online registration process would be complicated for users. The commenter noted that attorneys who practice before EOIR have varied computer skills.

Response. The Department appreciates the concerns expressed by the commenter. EOIR intends to create a user-friendly online registry and instructions for usage. As discussed previously, significant changes have occurred in the use of computers and the Internet since publication of the proposed rule. Computer usage and Internet access have become extremely common and a necessary aspect of the practice of law, including for the purposes of legal research and electronically filing documents with many courts. Therefore, the commenter's concerns regarding the computer skills of attorneys or accredited representatives are less pertinent now than they were at the time of the comment in 2004.

Comment. Two commenters expressed concerns about the proposal to place a "Practitioner Workstation" in each immigration court and at the Board to facilitate registration for attorneys and accredited representatives who did not have access to the Internet. One of the commenters noted that workstations would be costly to taxpayers, while another thought that maintaining a workstation at each court would be too burdensome.

Response. The notice of proposed rulemaking stated that EOIR would provide a "Practitioner Workstation" in each immigration court and at the Board in order to allow attorneys and accredited representatives to register electronically. As noted above, in the time that has elapsed since publication of the proposed rule, Internet access has become extremely common, and a necessity for the practice of law. Most representatives have access to the Internet at home or work. Therefore, the Department does not believe that

dedicated workstations are necessary at this time and cannot justify the expense of maintaining them. Accordingly, the final rule does not provide for EOIR to set up dedicated workstations at its immigration courts or offices. EOIR recognizes that, without such workstations, an unregistered attorney or accredited representative may not be able to register “immediately” after a hearing at which he or she is permitted to appear, as contemplated by the proposed rule. Therefore, EOIR has revised the language in the final rule to indicate that an unregistered attorney or accredited representative who is permitted to appear at a hearing must register “without delay.”

Comment. One commenter stated that the registration system should be designed to permit an unregistered attorney to appear at a hearing in the place of the attorney of record in a case without having to register.

Response. The final rule provides that an “immigration judge may, under extraordinary and rare circumstances, permit an unregistered attorney or accredited representative to appear at one hearing if the immigration judge first acquires from the attorney or accredited representative, on the record, the required registration information.”¹⁵ This one-time exception to the registration requirement permits a single appearance by an unregistered attorney, or accredited representative at one hearing.¹⁶ The hearing may be a master calendar, individual, custody or any other type of hearing. Such permission, if granted, would allow an unregistered attorney or accredited representative to, for example, “fill in” for an attorney of record prior to completing the

¹⁵ The one-time exception applies only to “one hearing” before an immigration judge. Note that generally, the Board decides appeals by conducting a paper review of cases, and only rarely holds oral argument. Because the immigration courts regularly hold courtroom proceedings and the Board rarely holds oral argument where attorneys or accredited representatives appear in person, the final rule provides that only an immigration judge may grant a one-time exception to allow an unregistered practitioner to appear.

¹⁶ “One hearing” means a single appearance by an attorney or accredited representative on behalf of a respondent(s) in a single case. This means that, for example, if an unregistered attorney or accredited representative is permitted under the one-time exception to appear on behalf of a respondent at a master calendar hearing, the attorney or accredited representative must register before representing any additional respondents appearing in different cases at that court session. In exceptional circumstances, in order to avoid prejudice or delay to other scheduled cases, “one hearing” may include an attorney or accredited representative appearing on behalf of more than one respondent at the same court session.

registration process. However, the final rule also requires the unregistered attorney or accredited representative to complete the registration process without delay after the hearing.

The Department believes that this provision is appropriate. It not only provides an opportunity for an unregistered attorney or accredited representative to appear when extraordinary and rare circumstances are present, but also ensures that the attorney or accredited representative will be properly registered in case he or she needs to appear before EOIR in the future. Such an approach maintains the integrity of the registry while providing flexibility when necessary. Registration is not burdensome because it is free and relatively simple.

Comment. One commenter stated that an immigration judge should not be authorized to permit an unregistered attorney to appear at a single hearing. The commenter was concerned that immigration courts may lack the ability to track and enforce the provision that an unregistered attorney will only be permitted to appear at one hearing until he or she is registered.

Response. While the Department appreciates the commenter's concern, the Department believes that it is necessary to provide immigration judges with the discretion to permit a single appearance by an unregistered attorney or accredited representative when circumstances warrant. This provision safeguards the right of aliens to be represented by counsel of their choice and may avoid unnecessary delays. If an unregistered attorney or accredited representative appears at a hearing and fails to complete the registration process after the hearing, that attorney or accredited representative would not be eligible to appear again until he or she registers, and EOIR may also consider whether additional sanctions might be appropriate under the circumstances.

Comment. One commenter raised a number of concerns about the impact of the registry on individual immigration cases. The commenter believed that registration

would preclude multiple attorneys from representing the same alien and that EOIR should permit multiple attorneys to appear in the same case. The commenter also expressed concern that an attorney who leaves a law firm can simply change his or her address in the registry without informing the law firm, presumably to take cases belonging to the law firm to another practice. Further, the commenter cautioned that EOIR needed to safeguard against a situation in which an accredited representative leaves the employ of a recognized organization before completing representation on all cases in which the accredited representative entered an appearance. Finally, the commenter suggested that when EOIR issues electronic notices, it should: transmit all notices to all attorneys of record on a case; provide by regular mail a copy of any notice sent electronically; and send a copy of all electronically served notices to a represented alien's email address. A different commenter wanted EOIR to ensure that all correspondence from EOIR will be sent to the attorney of record on a particular case, even if another attorney "filled in" for the attorney of record at a hearing.

Response. The registry will not change EOIR's current policies or practices regarding representation. For example, multiple attorneys or accredited representatives will continue to be permitted to appear simultaneously in a case before the immigration court, subject to conditions, and the immigration court will continue to send correspondence to the attorney or accredited representative of record, and not to any other attorney or representative who "filled in" for him or her. As the Board only recognizes one attorney or accredited representative of record, the Board will also only send correspondence to the attorney or accredited representative of record. In addition, the registry will not change EOIR's regulations providing that individual attorneys or accredited representatives, as opposed to law firms or recognized organizations, represent respondents. *See* 8 CFR 1292.1, 1292.4(a). If an attorney changes firms and notifies EOIR of his or her address change, he or she remains the attorney of record, absent the immigration judge or Board granting a request for withdrawal or substitution. *See* 8 CFR

1003.17(b). Similarly, if an accredited representative leaves a recognized organization, and notifies EOIR of his or her accreditation with another recognized organization, he or she remains the representative of record, absent the immigration judge or Board granting a request for withdrawal or substitution. *See id.*

If EOIR requires mandatory electronic filing in the future, it will issue a notice of proposed rulemaking on that subject, providing an opportunity to consider issues that may arise in individual cases due to such a system. The Department will consider such comments when determining how to establish an electronic filing system.

Comment. One commenter expressed concern regarding attorneys who may appear at hearings on behalf of a number of different law offices. The commenter stated that attorneys “who appear as ‘Of Counsel’ to other attorneys in particular cases, might find themselves unnecessarily subject to sanctions or other punishment simply because the nature of their practice requires them to handle cases on behalf of a number of different law firms.”

Response. Under the contemplated registration process, EOIR intends to require all attorneys and accredited representatives to register electronically. The fact that an individual attorney may handle cases on behalf of a number of different law offices will not be problematic under the registration process, as the registry will permit an individual attorney or accredited representative to enter multiple addresses.

Comment. Two commenters, representing several law school clinical programs, suggested that law school clinics should be able to register as entities in lieu of registering individual law students. They stated that permitting clinics to register as entities would make sense in light of the high turnover rate of law students and the close supervision that the law students receive by the faculty member who runs the clinic. Both commenters asserted that registering the clinic, not the individual student, would improve notice and accountability, and would increase efficiency by limiting any complications that may arise when cases are transferred between students when they

leave the clinic. One of the commenters also expressed concern that registered law students may use that registration to represent aliens without the clinic's oversight. The other commenter noted that while an individual student should not be able to register, he or she should continue to be able to enter a notice of appearance in his or her own name.

Response. The Department agrees with the commenters that law students should not be required to register with EOIR. The Department believes that, given the transient nature of law students' participation in clinical programs and the limited circumstances under which students can represent individuals before EOIR, it would be overly burdensome to require students to register. Specifically, it would be impractical to design a system under which a student's registration expired when he or she left a clinical program, particularly given the absence of any mechanism to inform EOIR when a student leaves a program. Further, there is no regulatory provision permitting a law student to appear before EOIR if not enrolled in a "legal aid program or clinic," and it would be problematic for those students to remain registered after leaving a clinical program. *See* 8 CFR 1292.1(a)(2)(ii) (stating, among other requirements, that a law student must be participating "in a legal aid program or clinic conducted by a law school or non-profit organization"). For these reasons, under the final rule, law students will not be required to register with EOIR. This rule will not affect the ability of a law student to enter an appearance in his or her own name pursuant to 8 CFR 1292.1(a)(2).

The Department does not adopt the commenters' suggestion that EOIR register law school clinic programs. EOIR's long-standing policy has been to only recognize individuals, and not entities, as representatives. *See* 8 CFR 1292.1, 1292.4(a). Entities, unlike attorneys or accredited representatives, are not subject to disciplinary sanctions for violations of the Department's regulations. *See* 8 CFR 1003.101(b). Therefore, EOIR would have difficulty regulating the conduct of entities if they were registered as the official representative on a case. With respect to commenters' concerns regarding accountability in cases handled by law students, the Department notes that law students'

appearances are governed by detailed regulations intended to ensure that the students receive adequate supervision. Specifically, to appear before EOIR, a law student must file a statement indicating, in part, “that he or she is participating, under the direct supervision of a faculty member, licensed attorney, or accredited representative, in a legal aid program or clinic.” 8 CFR 1292.1(a)(2)(ii). The adjudicator must expressly permit the student to appear, and the adjudicator “may require that [the] student be accompanied by the supervising faculty member, attorney, or accredited representative.” 8 CFR 1292.1(a)(2)(iv). In addition, once the final rule takes effect, the supervising faculty member (if he or she is also an attorney or accredited representative), attorney, or accredited representative will have the option to register.¹⁷

In light of its decision not to register law students, the Department has reconsidered whether it should register all of the “representatives” outlined in 8 CFR 1292.1. Because attorneys and accredited representatives account for the majority of individuals who practice before EOIR and may represent individuals without further authorization from an adjudicator, the Department will require these individuals to register. However, registering law graduates, reputable individuals, and accredited foreign government officials would be of extremely limited value. Law graduates and reputable individuals require prior permission to practice from the adjudicator on each case, and reputable individuals are ineligible to practice regularly before EOIR. *See* 8 CFR 1292.1(a)(2)(iv) and 1292.1(a)(3)(iv). Further, an accredited foreign government official may only appear before EOIR when acting in his or her official capacity and representing individuals who are from his or her country. *See* 8 CFR 1292.1(a)(5).

¹⁷ EOIR is not requiring those attorneys, accredited representatives, and faculty members in supervisory roles to register. There is no regulatory requirement that, when an alien is represented through a law school clinic, the supervisor enter an appearance before EOIR. In addition, with respect to supervisors who are not attorneys or accredited representatives, there is no specific regulatory provision under which they can appear before EOIR. Even though EOIR is not requiring law students or supervisors to register, EOIR anticipates that, in the future, its electronic filing system will permit filing where the alien is represented through a law school clinic.

Because the Department has decided to require registration of only attorneys and accredited representatives, it is no longer appropriate, as originally proposed, to amend the definition of “representative” at 8 CFR 1001.1(j) to state that all representatives must be registered. Instead, it is necessary to amend 8 CFR 1292.1(a)(4) so that the regulations will specifically require registration of only accredited representatives, and not other types of representatives.¹⁸ Due to this change, the Department will amend the parallel provision concerning attorneys at 8 CFR 1292.1(a)(1), rather than the regulatory definition of attorney at 8 CFR 1001.1(f).

Comment. One commenter suggested that law firms should be able to register rather than the individual attorneys employed by the law firm.

Response. As indicated above with regard to registration of law clinics, EOIR has a long-standing policy of recognizing only individuals as the attorney or representative of record for an alien. The reasons stated for declining to permit law clinics to register are equally applicable to law firms.

Comment. One commenter was concerned that EOIR would publicly disclose the information that it collects from attorneys and representatives during the registration process. The commenter also indicated that attorneys and representatives should not have to provide their home addresses or other private or personal information to EOIR.

Response. The information that EOIR will collect under this regulation is protected by the Privacy Act of 1974. *See* 5 U.S.C. 552a. The collected information will be part of a published system of records established pursuant to the Privacy Act. *See* 69 FR 26179 (May 11, 2004). EOIR may disclose information under the routine uses specified in the system of records notice. 69 FR at 26179-26180.

The Department may amend the system of records notice related to the information collected for the registry and may publish additional routine uses. One such

¹⁸ This final rule does not impose any new duties on or amend the regulations at 8 CFR part 1292 governing reputable individuals, law graduates, or accredited foreign government officials.

routine use, as described further below, may involve the disclosure on EOIR's website of the name and business address of each registrant so that the public will have notice of all attorneys and accredited representatives who are registered to practice before EOIR. The Department will publish any changes to the system of records notice in the Federal Register.

The final rule requires that individuals provide some personal information to EOIR. Attorneys and accredited representatives who register must provide an address; however, this address should be the address at which the registering individual normally receives business correspondence. If the registering individual's home address also serves as his or her business address, then the individual must provide that address to EOIR. Likewise, attorneys and accredited representatives who register must provide a business telephone number.

EOIR will also collect from attorneys and accredited representatives their dates of birth. This information will not be published, but is necessary for validation purposes and to differentiate and identify individuals in the registry. There may be numerous attorneys and accredited representatives with the same name. This additional unique identifying information will assist EOIR in properly authorizing individuals for inclusion in the registry and communicating with the appropriate individual on a case. However, as noted above, the Department has decided not to collect the last four digits of registrants' Social Security numbers.

Comment. One commenter believes that registration will not assist in stopping the unauthorized practice of law before EOIR. The commenter stated that because Form EOIR-28 already requires attorneys to provide bar admission information, immigration judges and the Board are able to determine if an individual is authorized to practice without a registry.

Response. The Department disagrees that a registry of attorneys and accredited representatives will not assist in combating the unauthorized practice of immigration law.

The unauthorized practice of immigration law, sometimes colloquially called “notario” fraud, is a significant problem facing federal, state, and local regulators. The Department is part of a national initiative to combat this problem.¹⁹ Electronic registration will help EOIR to combat notario fraud. Specifically, as noted above, EOIR will require that, before a registry account is approved and an EOIR ID issued, an attorney or accredited representative must present EOIR with photo identification so that EOIR can confirm his or her identity. There is currently no requirement that attorneys and accredited representatives present photo identification to EOIR.

A registry will provide EOIR adjudicators with a database of individuals who are authorized to practice before them. EOIR will require each registrant to provide his or her unique EOIR ID number on any Form EOIR-27 or Form EOIR-28 that he or she files, to assist adjudicators in more readily identifying the registrant’s status. Further, when EOIR eventually creates an electronic filing system, only registered attorneys and accredited representatives will be able to file documents electronically in cases. Finally, EOIR may provide a list of names and business addresses of registered attorneys and accredited representatives on its Internet website so that the public can determine if the individual from whom they are seeking representational services is in fact registered to practice before EOIR. The Department invites public comment on whether it should publish such a list on the Internet.

Comment. Two commenters suggested that requiring attorneys and representatives to register with EOIR would have a negative effect on pro bono representation of aliens. Both commenters expressed concerns that registration would deter lawyers from pro bono practice if they have never before practiced immigration law because they might believe that registering is too burdensome.

¹⁹ On June 9, 2011, the U.S. Government launched a multi-agency, nationwide initiative to combat immigration services scams. The Department, including EOIR, along with the Department of Homeland Security and the Federal Trade Commission, are leading this effort. Additional information is available at <http://www.justice.gov/eoir/press/2011/UPILJointRelease%2006092011.pdf>.

Response. EOIR is committed to encouraging pro bono and low cost representation of aliens. EOIR maintains and distributes to unrepresented aliens a list of free legal services. *See* 8 CFR 1003.61 *et seq.* Further, EOIR has a program by which it officially recognizes non-profit organizations and accredits non-attorney members of those organizations to provide representation to aliens for a nominal fee. 8 CFR 1292.2. Although a pro bono attorney will need to register, it is a one-time event consisting of a simple two-step process that can be accomplished quickly, easily, and at no cost to the registrant.

The Department does not believe that pro bono representation will be significantly affected by requiring registration. Attorneys are familiar with the concept of having to be admitted to practice prior to appearing before a tribunal. Therefore, attorneys who have never practiced immigration law should expect that they may need to register in order to practice before EOIR.

Further, attorneys wishing to appear on EOIR's list of free legal services must apply to be placed on the list, *see* 8 CFR 1003.62, 1003.63, and recognized organizations that seek accreditation of non-attorneys to practice before EOIR must apply for that accreditation. *See* 8 CFR 1292.2(d); *Matter of EAC, Inc.*, 24 I&N Dec. 563 (BIA 2008). There is no evidence that either of these requirements has significantly affected pro bono representation. Likewise, the Department does not expect that the registration process outlined in this final rule will deter pro bono representation.

Comment. One commenter stated that the regulation should require counsel for the Department of Homeland Security (DHS) to register with EOIR.

Response. The purpose of the registry is to create a database of all private attorneys and accredited representatives who appear before EOIR. This registry will ensure that EOIR is only allowing authorized individuals to practice before its immigration judges and the Board. The reasons for registering private attorneys and accredited representatives are not relevant to DHS counsel. DHS counsel are Federal

employees and may include any officer assigned to represent DHS in any proceeding before an immigration judge or the Board. *See* 8 CFR 1001.1(s). Therefore, it is extremely unlikely that an unauthorized individual would represent DHS at an EOIR proceeding. For these reasons, the Department declines to include DHS personnel in the registry.

Comment. One commenter suggested that the registration process would inhibit robust representation of individuals in immigration proceedings by allowing the government to track which lawyers are taking “controversial” cases.

Response. EOIR disagrees that the registration process would inhibit robust representation of individuals in immigration proceedings. EOIR must register attorneys and representatives as an initial step in the process of creating an electronic case access and filing system. Registering attorneys and accredited representatives will reduce scheduling errors and avoid confusion as to who is representing a particular alien. In addition, registered attorneys and accredited representatives will be able to update their registration information electronically via the Internet and, in the future, access EOIR’s electronic filing system to submit and potentially retrieve documents.²⁰ These benefits will encourage, not detract from, robust representation on behalf of individuals in immigration proceedings.

EOIR is committed to providing fair and unbiased adjudications and in issuing this rule has no intent to inhibit the representation of aliens. The registration process would have no impact on “the practitioner’s duty to represent zealously his or her client within the bounds of the law.” *See* 8 CFR 1003.102.

V. Regulatory Requirements

Regulatory Flexibility Act

²⁰ As noted above, EOIR intends to issue guidance, as needed, to be followed when an attorney or accredited representative seeks to change his or her address.

The Attorney General, in accordance with the Regulatory Flexibility Act, has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

The Department estimates that no more than 54,000 private attorneys and accredited representatives will register electronically the first year in order to practice before EOIR. Given that registration only needs to be done once, EOIR anticipates that in each subsequent year, the number of new initial registrants will be significantly lower than the number of such registrants for the first year. While EOIR does not keep statistics on the size of the firms and organizations of attorneys and accredited representatives practicing before EOIR, many of these attorneys and accredited representatives may be classified as or employed by “small entities” as defined under section 601 of the Regulatory Flexibility Act. In particular, the Department recognizes that there are attorneys whose firms may be classified as “small businesses” and, thus, as “small entities” under section 601. For example, there may be attorneys practicing before EOIR who are solo practitioners or employed by firms with 2 to 30 people. There are also non-profit religious, charitable, social service, or similar organizations recognized to practice before EOIR under 8 CFR 1292 who employ accredited representatives. Some of these recognized organizations may also be classified as “small organizations” and, thus, as “small entities” under section 601.

Although the exact number of law firms and recognized organizations that may be classified as “small entities” is not known, the Department certifies that this rule will not have a significant adverse economic impact on a substantial number of these entities. Registering electronically with EOIR will be a simple, routine process similar to registering online for a library card or other similar services. In order to register, attorneys and accredited representatives will need to access the Internet and complete an electronic registration providing the following information: name, business address(es),

business telephone number(s), date of birth, email address, bar admission information (if applicable), and recognized organization (if applicable). Prior to approving a registry account and issuing an EOIR ID, EOIR will also require registrants to validate their identities by presenting photo identification in person. Completion of the registration process, including registering online and presenting photo identification for identity validation, will take approximately 10 minutes for each registrant and only needs to be completed once.

There will be no financial costs to attorneys or accredited representatives to register. EOIR will not assess a fee to register. Most attorneys and accredited representatives practicing before EOIR currently have Internet access in order to conduct legal research, communicate with clients, access government resources, and submit filings to Federal courts of appeal and DHS; therefore, they will not need to incur any new costs in order to obtain access. Consequently, the Department believes that there will not be a significant adverse economic impact on the great majority of registrants.

As described below in the certification under Executive Orders 12866 and 13563, the Department believes that such registration will economically benefit registrants. By creating a registry in which each attorney or accredited representative is individually and uniquely identified, EOIR will be able to improve its correspondence with registrants regarding immigration matters, including scheduling matters before EOIR. This will reduce the likelihood that attorneys and accredited representatives will need to incur costs in communicating with clients and EOIR regarding incorrectly scheduled hearings. In addition, registration ultimately will enable an electronic filing system that will reduce the time and expense presently incurred with paper filings. Attorneys and accredited representatives will reduce the costs associated with purchasing paper and printing supplies to prepare paper-based forms and petitions and mailing such filings to EOIR and government counsel.

Therefore, the Department certifies that this rule will not have a significant adverse economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804. As discussed in the certification under the Regulatory Flexibility Act, attorneys and accredited representatives will not be assessed a fee to register and, as Internet access in the legal field is ubiquitous, most will not need to incur any new costs in order to obtain access to the Internet. Thus, this rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Executive Orders 12866 and 13563 - Regulatory Planning and Review

The final rule is considered by the Department of Justice to be a “significant regulatory action” under Executive Order 12866, section 3(f)(4), Regulatory Planning and Review. Accordingly, the regulation has been submitted to OMB for review. The Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental,

public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.²¹

This rule establishes procedures for private attorneys and accredited representatives to register electronically with EOIR as a condition of representing aliens before immigration judges and the Board. Requiring attorneys and accredited representatives to register electronically with EOIR is a necessary precursor to implementing an electronic case access and filing system.

The registration of attorneys and accredited representatives will greatly benefit EOIR. Through the registration process, EOIR will ensure that each attorney or accredited representative will be individually identified and associated with the registration information that the attorney or accredited representative will provide during registration. This will reduce errors concerning an attorney's or accredited representative's correct mailing address and avoid confusion as to who is representing a particular alien. EOIR will collect from each authorized registrant a unique UserID and password that will permit registrants to access the registry in order to update their registration information online and, in the future, to access EOIR's electronic filing system. Further, EOIR will use the collected information to assign a unique EOIR ID number to each registrant. EOIR will require each registrant to provide his or her unique EOIR ID number on any Form EOIR-27 or Form EOIR-28 that he or she files to assist adjudicators in more readily identifying the registrant's status.

²¹ Following the issuance of Executive Order 13563, the Department issued its "Preliminary Plan for Retrospective Analysis of Existing Rules" (Plan) on May 18, 2011, identifying several regulations that it plans to review. *See* Plan, *available online at* <http://www.justice.gov/open/preliminary-doj-rr-plan.pdf>. In a separate rulemaking, the Department will address the proposed amendments that it is considering as part of the retrospective review under the Plan. Although this rulemaking addressing EOIR's registry is not part of the Department's retrospective review, it is consistent with the goals of that review. Specifically, it will improve the immigration courts' and Board's ability to function efficiently and, as the first step toward electronic filing, it will lead to major benefits for attorneys and accredited representatives who practice before EOIR.

An online registration process will be required for registration. For the initial registration, attorneys and accredited representatives will be required to complete an electronic registration in which they must provide the following information: name, business address(es), business telephone number(s), date of birth, email address, bar admission information (if applicable), and recognized organization (if applicable).

The Department estimates that no more than 54,000 attorneys and accredited representatives will register electronically the first year. Given that registration only needs to be done once, EOIR anticipates that in each subsequent year, the number of initial registrants will be significantly lower than the number of such registrants for the first year. For each registrant, completion of the registration process, including registering online and presenting photo identification in person for identity validation, will take approximately 10 minutes. There is no fee to register. Consequently, the Department believes that the costs to attorneys and accredited representatives to complete the registration process with EOIR will be nominal.

The registration of attorneys and accredited representatives will greatly benefit registrants. The registry will ensure that each attorney or accredited representative is individually and uniquely identified and associated with the registration information that the attorney or accredited representative will provide during registration. This will increase efficiency by reducing system errors in scheduling matters and providing improved notice to attorneys and accredited representatives. In addition, registration ultimately will enable an electronic filing system that will reduce the time and expense presently incurred with paper filings.

Executive Order 13132 – Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient

federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 - Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

The Department of Justice has submitted a request for approval of a new information collection instrument to OMB for review in accordance with the Paperwork Reduction Act (PRA) of 1995. The proposed new information collection was published and comments regarding the collection were requested in the notice of proposed rulemaking in 2003 in accordance with 5 CFR 1320.11. *See* 68 FR 75160, 75163. The proposed new information collection is republished in this rule to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days in conjunction with the final rule. EOIR will not commence the proposed new information collection until it has satisfied its obligations under the PRA.

If you have any suggestions or comments, especially on the estimated public burden or associated response time, or need a copy of the proposed new information collection instrument with instructions or additional information, please contact the Department as noted above. Written comments and suggestions from the public and affected agencies concerning the proposed new information collection instrument are encouraged.

Comments on this issue should address one or more of the following four points: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) how the Department could enhance the quality, utility, and clarity of the information to be collected and

(4) how the Department could minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

The new information collection instrument sponsored by the Department will apply to practitioners and has been designated as “*Attorney and Accredited Representative Registration Before the Executive Office for Immigration Review*.” The new collection will be administered through electronic means exclusively.

The collected information will be used to approve a unique UserID and password permitting registrants to access the registry in order to update their registration information online and, in the future, to access EOIR’s electronic filing system. Further, EOIR will use the collected information to assign a unique EOIR ID number to each registrant. EOIR will require each registrant to provide his or her unique EOIR ID number on any Form EOIR-27 or Form EOIR-28 that he or she files to assist adjudicators in more readily identifying the registrant’s status.

The Department estimates an average response time for the new information collection instrument at 10 minutes per response (including registering online and presenting photo identification to EOIR for identity validation), with a total number of respondents of no more than 54,000 individuals for the first year. This figure includes those currently practicing before EOIR. Given that registration only needs to be done once, EOIR anticipates that in each subsequent year, the number of initial registrants (i.e., new attorneys who seek to appear before EOIR) will be significantly lower than the number of such registrants for the first year. The total public burden associated with the new collection is no more than 9,000 burden hours for the first year. EOIR anticipates burden hours in future years to be significantly lower than in the first year.

List of Subjects in 8 CFR Part 1292

Administrative practice and procedures, Immigration, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, part 1292 of title 8 of the Code of Federal Regulations is amended as follows:

PART 1292--REPRESENTATION AND APPEARANCES

1. The authority citation for Part 1292 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1252b, 1362; 6 U.S.C. 521, 522.

2. Amend § 1292.1 by:

a. Revising paragraphs (a)(1) and (a)(4); and by

b. Adding paragraph (f), to read as follows:

§ 1292.1 Representation of others.

(a) * * *

(1) *Attorneys in the United States.* Any attorney as defined in § 1001.1(f) of this chapter and who, once the registration requirements in paragraph (f) of this section have taken effect, is registered to practice with the Executive Office for Immigration Review.

* * * * *

(4) *Accredited representatives.* A person representing an organization described in § 1292.2 of this chapter who has been accredited by the Board, and who, once the registration requirements in paragraph (f) of this section have taken effect, is registered to practice with the Executive Office for Immigration Review.

* * * * *

(f) *Registration requirement for attorneys and accredited representatives.* The Director or his designee is authorized to register, and establish procedures for registering, attorneys and accredited representatives, specified in paragraph (a) of this section, as a condition of practice before immigration judges or the Board of Immigration Appeals. Such registration procedures will include a requirement for electronic registration and that each registrant validate his or her identity by presenting photo identification. The

Director or his designee may administratively suspend from practice before the immigration judges and the Board any attorney or accredited representative who fails to provide the following required registration information: name, business address(es), business telephone number(s), date of birth, email address, bar admission information (if applicable), and recognized organization (if applicable), or who, after having provided that information, fails to present photo identification or comply with any other validation requirements implemented by the Director. After such a system has been established, an immigration judge may, under extraordinary and rare circumstances, permit an unregistered attorney or accredited representative to appear at one hearing if the immigration judge first acquires from the attorney or accredited representative, on the record, the required registration information. An unregistered attorney or accredited representative who is permitted to appear at a hearing in such circumstances must complete the electronic registration process without delay after the hearing at which he or she is permitted to appear.

March 22, 2013
Date

Eric H. Holder, Jr.
Attorney General

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